SUPREME COURT OF ARKANSAS

No. 07-305

IN RE: RULES GOVERNING WAIVER OF ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT DOCTRINE	**Opinion Delivered** 5-24-07

PER CURIAM

The Arkansas Bar Association petitions the supreme court to amend Arkansas Rule of Evidence 502 by adding new subdivisions (e) and (f). We publish the recommended changes for comment from the Bench and Bar and ask that comments be sent to Leslie Steen, Clerk of the Arkansas Supreme Court, 625 Marshall Street, Little Rock, Arkansas 72201, on or before July 1, 2007. The recommended changes are as follows:

> (e) *Inadvertent disclosure.* A disclosure of a communication or information covered by the attorney-client privilege or the work-product doctrine does not operate as a waiver if the disclosing party follows the procedure specified in Rule 26(b)(5)(D) of the Arkansas Rules of Civil Procedure and, in the event of a challenge by a receiving party, the circuit court finds in accordance with Rule 26(b)(5) that there was no waiver.
>
> (f) *Selective waiver.* Disclosure of a communication or information

covered by the attorney-client privilege or the work-product doctrine to a governmental office or agency in the exercise of its regulatory, investigative, or enforcement authority does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities.

Comment

Subdivision (e) is a cross-reference to Rule 26(b)(5). Its placement here is analogous to the inclusion of subdivision (d)(3)(B) in Arkansas Rule of Evidence 503, the physician-patient privilege. That subdivision tracks subdivision (c)(2) of Arkansas Rule of Civil Procedure 35(c)(2), which governs discovery of medical information.

Under subdivision (f), disclosure information covered by the attorney-client privilege or the work-product doctrine to a government agency conducting an investigation of the client does not constitute a general waiver of the information disclosed. In short, this provision adopts a rule of "selective waiver" consistent with the Eighth Circuit's view that disclosure of protected information to the government does not constitute a general waiver, so that the information remains shielded from use by other parties. *E.g.*, *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

This is the minority view among the federal courts. Most have held that waiver of privileged or protected information to a government agency constitutes a waiver for all purposes. *E.g.*, *In re Qwest Communications Intern, Inc.*, 450 F.3d 1179 (10th cir. 2006). Others have recognized selective waiver only if the disclosure was made subject to a

confidentiality agreement with the government agency. *E.g.*, *Teachers Insurance & Annuity Ass'n v. Shamrock Broadcasting Co.*, 521 F. Supp. 638 (S.D.N.Y. 1981).

Subdivision (f) adopts the Eighth Circuit's position, which is also reflected in a draft that the Federal Advisory Committee on Evidence has published for public comment. This draft, which would create new Federal Rule of Evidence 502, is available online at the federal juridiary's website on rulemaking. *See* http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf#page=4. Proposed subdivision (f) is based on subdivision (c) of the draft federal rule.

The selective waiver provision in the federal draft has been the target of some criticism. For example, the Association of Corporate Counsel has said that "while well-intentioned, it may have a negative impact on the larger issue given the current context of a 'culture of waiver' that has been created by government enforcement officials and prosecutors who have abused their discretion by routinely coercing companies to waive their privilege." Similarly, some members of the ABA – speaking for themselves, not the organization – have written that "adopting the rule in the 'culture of waiver' environment puts a Band-Aid on the corporate injury caused by wrong-headed governmental policies."

In essence, these critics would prefer that the federal advisory committee, and ultimately Congress, address the broader issues posed by Department of Justice policies. The Arkansas Bar Association believes, as its Task Force concluded, that half a loaf is better than none. As one commentator has written, selective waiver "will limit both the government's

ability to manipulate the privilege and plaintiffs lawyers' incentive to sue first and discover claims later." He further explained:

> All things being equal, a company should not be able to waive privilege as to some and then invoke it as to others. But things are not equal. Today's circumstances are very different . . ., though courts rejecting selective waiver have not recognized this change. The federal government, in particular the SEC, is at least implicitly pressuring companies to waive the attorney-client privilege and work-product protection. The remarkably unsettled case law makes it impossible for a company to know exactly what it risks by producing materials to the government, yet it "cooperates" anyway and thereby erodes employees' willingness to consult with their counsel. This is not a business decision; it is a corporate reaction to an abuse of government power. And since fairness is the touch-stone of the courts' analysis, selective waiver is both justifiable and necessary.

Dore, *A Matter of Fairness: The Need for a New Look at Selective Waiver in SEC Investigations*, 89 MARQ. L. REV. 761, 794 (2005).

It has been suggested that only a uniform, national rule will solve the problem. That may well be so, and it is arguable that Congress has the power to federalize the attorney-client privilege and the work-product doctrine by enacting a statute that preempts state law. *See generally* Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59 (2002); Note, *Preserving the*

Privilege: Codification of Selective Waiver and the Limits of Federal Power Over State Courts, 86 B.U. L. REV. 691 (2006).

Until Congress takes this step, however, the Arkansas Bar Association is of the opinion that a state rule addressing selective waiver can be beneficial. Suppose, for example, that a corporation retained a law firm to investigate apparent accounting improprieties; turned over the resulting report and supporting documents to the S.E.C. and U.S. Attorney in connection with their investigations; and then found itself being asked by plaintiffs in an accounting fraud action in state court to produce the report and documents during discovery. In that situation, the Georgia Supreme Court held that the corporation had waived work-product protection by providing the material to federal investigators. *See McKesson Corp. v. Green*, 279 Ga. 95, 610 S.E.2d 54 (2005). The selective waiver rule of subdivision (f) would lead to the opposite result in such a case brought in Arkansas.